IN THE

# Supreme Court of the United States

October Term, 1958.

No. [redacted]

EDGAR ALLEN WEST,

*Petitioner,*

v.

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, et al.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

# BRIEF FOR PETITIONER.

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1958.

No. 541.

EDGAR ALLEN WEST,

*Petitioner,*

*v.*

UNITED STATES OF AMERICA, UNITED STATES DEPARTMENT OF COMMERCE, MARITIME ADMINISTRATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## BRIEF FOR PETITIONER.

### OPINIONS BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania is reported at 143 F. Supp. 473 (E. D. Pa., 1956) (R. 8). The opinion of the Court of Appeals for the Third Circuit is reported at 246 F. 2d 443 (R. 129).

### JURISDICTION.

The judgment of the Court of Appeals was entered on July 2, 1958 (R. 131). On September 9, 1958, Mr. Justice William J. Brennan, Jr., entered an order extending the time for filing a petition for writ of certiorari to and including November 29, 1958 (R. 140). The petition for certiorari was filed on November 28, 1959, and certiorari was granted on March 2, 1959. The jurisdiction of this court rests upon 28 U. S. C. Sec. 1254(1).

## QUESTIONS PRESENTED.

Where the vessel is taken out of an inactive status and after navigating under tow several hundred miles through navigable waters to a pier in navigable waters and where the shipowner engaged an independent contractor to overhaul and prepare the vessel for a voyage at sea:

1. Does the warranty of seaworthiness extend to a harborworker engaged in preparing the vessel for the voyage?

2. Is the non-delegable duty to provide a safe place to work an absolute one under the warranty of seaworthiness, or is it a non-delegable duty related to negligence?

3. Is the shipowner liable in terms of negligence under his non-delegable duty to use reasonable care, where, in the course of preparing the vessel for sea, an insecurely fitted pipe plug was precipitated out of the pipe when the water pressure was turned on by one of the repairmen, striking and injuring petitioner?

## STATEMENT OF THE CASE.

This action was instituted by petitioner, a ship repairman, against the United States of America, seeking to recover damages for injuries sustained aboard the S. S. "Mary Austin", a liberty ship owned by the respondent, United States. The United States impleaded the petitioner's employer, Atlantic Port Contractors, Inc., which was under contract to the United States for the overhauling and repair of the "Mary Austin". The trial was held before the court, sitting without a jury, which ruled in favor of the United States and against the petitioner herein. The judgment of the district court was affirmed by the Court of Appeals for the Third Circuit.

The undisputed facts disclose that the "Mary Austin" is a liberty ship which had been laid up in Norfolk, Virginia,

in the "mothball fleet" until the outbreak of the Korean War. In May of 1951, the Government removed the vessel from its inactive status and manned it with a crew of six men: a captain, chief mate, second mate, chief engineer, first assistant engineer and steward (R. 83). The vessel was then towed several hundred miles through navigable waters from Norfolk, Virginia, to a shipyard in Chester, Pennsylvania, where an inspection and survey of the vessel was conducted. It was then further towed through navigable waters and moored in the Delaware River at Pier 5 in Philadelphia for certain repairs. Two days later the vessel was shifted to and moored at Pier 9 in Philadelphia where the overhaul was continued to its completion. At no time was the vessel placed in drydock, the entire operation having been performed while the vessel was moored in the navigable waters of the Delaware River.

On November 21, 1951, during the course of the foregoing overhaul while petitioner was working on the vessel inside the low pressure cylinder of the main engine, he was struck on the knee by a pipe plug which had been precipitated downward from one of the overhead pipes. The court below found that the plug had been loosely fitted in its socket and was forced out when the water pressure was turned on.

Petitioner sought recovery upon two theories: (1) that the vessel was unseaworthy in that the plug which had been fitted insecurely in the pipe was incapable of withstanding the water pressure exerted upon it; and (2) that under its non-delegable duty respondent was liable under theories of negligence because the repairmen were negligent in turning on the water pressure and because respondent failed to warn anyone of the dangerous condition.

The trial court found that the warranty of seaworthiness did not extend to petitioner because the nature of the work took him "out of the class of persons to whom the warranty of complete seaworthiness runs". The trial judge held that the insecure fitting of the pipe plug in the pipe

did not create an unsafe condition, but rather that the unsafe condition resulted from the turning on of the water pressure by the repairmen. While the trial court ruled that the duty to provide a safe place to work was non-delegable, nevertheless, it held that the shipowner could not be held responsible for the actions of the contractor in turning on the water, which in turn caused the loosely fitted pipe plug to be forced out, causing petitioner's injury.

The Court of Appeals affirmed these rulings of the district court. It held that the duty to provide a safe place to work was related to theories of negligence and not to the warranty of seaworthiness, and since the accident to West was occasioned by the negligence of a fellow worker, the shipowner could not be held liable, despite its non-delegable duty in this regard. In ruling that the warranty of seaworthiness was not applicable, the Court of Appeals introduced a new theory by holding that the warranty does not apply even though the vessel may be in navigable waters, for it is not actively engaged in navigation. The court does not make clear or define the term "navigation" as used in the instant case, but it is abundantly clear that its holding and new theory is in conflict with the decisions of this court.

It must be noted at the outset that this approach to the problem is wholly erroneous because this court has already established that the warranty applies (1) if the vessel is in navigable waters; and (2) whether the injured worker is engaged in some sort of active (though undefined) service before the warranty applies. Moreover, the court below also erred in its premise as to when a vessel is not in navigation.

## ARGUMENT.

### Point One: A Vessel Under Repair in Navigable Waters Is a Vessel in Navigation and, Therefore, the Warranty of Seaworthiness Extends to Those Workers on the Vessel Engaged in Her Repair.

The Court of Appeals, in affirming the decision of the trial court, ruled that the warranty of seaworthiness had no application to the case at bar in that the "Mary Austin" was not a vessel in navigation at the time of the mishap.

In arriving at its conclusion, the court below sought support from a strained analogy drawn between a vessel not yet completed and one which had been in navigation, was laid up, and was now being worked upon for the sole purpose of readying her for a voyage at sea. The court below reasoned that since a vessel not yet completed was not considered a vessel in navigation, a vessel that was once in navigation but out of active service was, during the course of its preparations for a sea voyage, no different from an incomplete vessel which has not yet been placed in service. Such analogy has no basis in the law.

The distinction between the status of a vessel under construction and one which has previously been completed and, thereafter, is taken out of service, has long been recognized. *Kilb v. Menke*, 121 F. 2d 1013 (5 Cir., 1929); *The V-1813*, 65 F. 2d 789 (5 Cir., 1933). In *North Pacific S. S. Co. v. Hall Bros., etc.*, 249 U. S. 126-127, this court stated:

> "It is settled that a contract for building a ship or supplying materials for her construction is not a maritime contract. . . . But the true basis for the distinction between the construction and the repair of a ship, for purposes of the admiralty jurisdiction, is to be found in the fact that the structure does not become a ship, in the legal sense, until it is completed

and launched. '*A ship is born when she is launched, and lives so long as her identity is preserved.* Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject to mechanics' liens created by state law, enforceable in state courts. In the baptism of launching, she receives her name, and from the moment her keel touches the water she is transformed and becomes a subject of admiralty jurisdiction.' Tucker v. Alexandroff, 183 U. S. 424." (Emphasis supplied.)

And in *Hercules Co. v. The Brigadier General Absolom Baird*, 214 F. 2d 66 (3 Cir., 1954), another panel of the same court which decided this case, in circumstances much the same as those at bar, stated at page 69:

"Nor is it necessarily fatal that in 1950 and part of 1951 the Baird was unable to navigate under her power. An essential element of claimant's objection is a finding that the Baird had been withdrawn from marine commerce and navigation. There is no such finding here, and we think this record could not support one if it had been made. Indeed, the efforts of everyone concerned were bent upon readying her for a sealing voyage. That is sufficient devotion to maritime commerce to make her a vessel. . . . *If the Baird ever was withdrawn from navigation and marine commerce, she was returned to those pursuits when her owners and would-be owners began putting her in shape for an intended voyage*, which in fact took place in April of 1951, libellant's services being largely responsible for her ability to depart on that voyage." (Emphasis added.)

Therefore, it is clearly erroneous to say that a vessel after having been completed and launched, and then taken

out of active service, is out of navigation when, in fact, she is simply undergoing repairs in navigable waters preparatory for sea duty.

What is more, in the case at bar, the "Mary Austin" remained in navigable waters at all times. It was taken out of its inactive status at Norfolk and was towed to Philadelphia. When thus plying the waters of the Chesapeake and Delaware Bays and the Atlantic Ocean under tow, it was clearly a vessel in navigation, at least equal to the dead barges which are towed daily over the same route and which have invariably been termed vessels in navigation. See *Warner v. Norton*, 321 U. S. 565; *Ellis v. U. S.*, 206 U. S. 246; *The Dick-Keys*, Fed. Case No. 3898; *Kate Tremaine*, Fed. Case No. 7622; *Seabrook v. Raft of Railroad Crossties*, 40 F. 596; *Saylor v. Taylor*, 77 F. 476; *McRae v. Bowers Dredging Co.*, 86 F. 344; *The Ark*, 17 F. 2d 446. In addition, when the "Mary Austin" was taken out of its laid up status, it was manned by a captain, chief mate, second mate, chief engineer, first assistant engineer and steward, all of whom were attached to the vessel and whose function was to look after the vessel's interest. In supplemental answers to Interrogatory No. 6, the respondent admitted this when it stated:

> "The members of the crew of the SS Mary Austin were Master T. G. Karso, 56 Goble, Newark, New Jersey; Chief Officer A. A. Haus, 95 Beeckman Avenue, Tarrytown, New York; Second Officer Jerome L. Greenberg, 1904 South 36th Street, Omaha, Nebraska; Chief Engineer Arthur O'Connor, 42 Conyingham Avenue, Randall Manor, Staten Island, New York; First Engineer Charles Booth, 620 Gaul Street, Philadelphia, Pennsylvania; Chief Steward Jose Salguero, 1017 Intervale Avenue, Bronx, New York."

The officers of the vessel kept log books which contained detailed accounts of the events taking place aboard the

vessel. Regular watches were stood by the crew and were recorded in the log. While the vessel was berthed at the pier undergoing repairs, certain night mates were engaged for the various watches on the vessel (R. 119). In all respects, the captain and the five other men, as aided by such other relief personnel as were required, performed the services regularly and ordinarily performed by members of the crew.[1]

The fact that these men signed no shipping articles in no way militates against the assumption that they were in fact crew members and that the vessel was in navigation. *Warner v. Norton, supra; The Falco*, 20 F. 2d 362 (2 Cir., 1927); *Jansen v. The Theodore Heinrich*, Fed. Case No. 7215; *Clark v. Montezuma Transportation Co.*, 216 N. Y. S. 295. It should be noted in this regard that shipping articles must be signed only if the vessel is engaged in foreign or intercoastal commerce, 46 USCA 564, and therefore there is no need for the crew members in this case to have signed shipping articles. See 1 Norris, Law of Seamen, Sec. 4.

Applying the principle which this court laid down in the *North Pacific S. S. Co. v. Hall Bros., supra*, the "Mary Austin" was born when she was launched and she remained a subject of admiralty jurisdiction so long as her identity was preserved; and as was stated in *Hercules Co. v. The Brigadier General Absolom Baird, supra*, if she was "withdrawn from navigation and marine commerce, she was returned to those pursuits when her owner and would-be owner began putting her in shape for an intended voyage."

In this case, the "Mary Austin" actually engaged in a voyage from Norfolk to Philadelphia after she was removed from her inactive status in Norfolk, and manned with a crew of officers. She was then prepared for a specific voyage. At the time of the petitioner's injury on November 21, 1951, in addition to the fact that the vessel was manned

1. Compare *Lawrich v. Warner Co.*, 118 F. 2d 690, and *Warner v. Norton*, 321 U. S. 565, where only one man constituted the crew of the barge without motive power.

with a captain and a crew, the ship's equipment including the pumps, boilers and dynamos were in operation (R. 65). She was at that time virtually well prepared for her contemplated voyage.

**Point Two: A Shipowner Is Liable for Unseaworthiness of a Vessel to a Shore-based Worker Who Performs Labor on a Ship, Regardless of Whether the Vessel Was in Navigation.**

While there is little question but that the "Mary Austin" was a vessel in navigation and that petitioner is entitled to recovery even under the test set forth by the court below, there is no requirement that a vessel be in navigation in order to have the warranty of seaworthiness apply. It is settled law that every specie of tort occurring upon navigable water is of the admiralty cognizance and that the admiralty will apply maritime concepts thereto. *The Plymouth*, 70 U. S. (3 Wall) 20; 1 Benedict Admiralty 127. The concept of unseaworthiness arose under the general admiralty law and was based upon the danger implicit in the seaman's service. Nowhere was there a requirement that the vessel be in so-called "active navigation" as distinguished from being in navigable waters.

Until well into the present century, this absolute duty upon a shipowner to provide and maintain a seaworthy vessel was restricted to seamen. Shoreside employees were relegated to recover under negligence concepts of "business invitee". However, owing to the exigencies of increasing commerce and the demand for rapidity and skill in the operation of traditional seamen's work, these duties once reserved to seamen devolved upon harbor workers, and the courts took cognizance of the fact that the devolution of the seaman's services to harbor workers carried with it the dangers implicit in that service. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52 (1913).

Therefore, because of the nature of the work involved, the courts rendered unto this class of maritime workers the

same benefits enjoyed by the mariners whose work they assumed. Thus, when Congress gave seamen the right to recover for operating negligence and abolished the fellow servant doctrine as a defense, Mr. Justice Holmes in *International Stevedoring Co. v. Haverty*, 272 U. S. 50, expanded the beneficial scope of the Jones Act to include such shoreside employees as were performing seamen's work.

Mr. Justice Rutledge, writing for the majority, in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, adopted the reasoning set forth in the *Imbrovek* and *Haverty* cases, and concluded that *for purposes of maintaining an action based on unseaworthiness*, the stevedore was "in short a seaman *because he is doing seaman's work and incurring a seaman's hazards.*" In *Sieracki*, Mr. Justice Rutledge described the reasons behind extending the doctrine of the warranty of seaworthiness to stevedores when he stated at pages 94-95:

> "It is essentially a species of liability without fault, analogous to other well known instances in our law. *Derived from and shaped to meet the hazards which performing the service imposes*, the liability is neither limited by conceptions of negligence nor contractual in character. It is a form of absolute duty owing to all within the range of its humanitarian policy."

See also *Pope & Talbot v. Hawn*, 346 U. S. 406 (1953).

Therefore, based upon the hazards implicit in maritime employment, there was thus extended to workers who are exposed to shipboard dangers the concepts of liability without fault.

Accordingly, as the warranty of seaworthiness is part of the general admiralty law, and as this law is called into play whenever a maritime tort is committed, the injury at bar having occurred aboard a vessel in navigable waters, the warranty of seaworthiness must be applied so long as the nature of the work involved was in preparing the vessel

for sea or to receive cargo or other purposes having to do with the vessel's enterprise. There is no requirement that the vessel be in navigation in order for this doctrine to apply because these harbor workers performed seamen's services in the vessel's interest while the vessel lay in navigable waters.

**Point Three: The Warranty of Seaworthiness Extends to Maritime Workers Engaged in the Repair or Overhauling of Vessels in Navigation.**

The opinion of the court below professed its devotion to the concepts set forth in *Pope and Talbot v. Hawn*, 346 U. S. 406 (1953), when it recognized that a shoreside worker engaged in loading or repairing a ship in active navigation is entitled to the benefit of the warranty of seaworthiness; however, it refused to apply that concept to the case at bar because it determined that the job of preparing a laid up vessel for active service "is not something which bears any resemblance to marine navigation."

The "Mary Austin" being a vessel in navigation at the time of the petitioner's injury, it appears difficult, if not impossible to reconcile the lower court's acceptance of the holding in *Pope and Talbot v. Hawn, supra*, with its determination in the case at bar. In both cases the neglect of the maritime duty occurred upon navigable waters and in the performance of a service necessary to enable the ship to discharge its maritime duty.

In the early days of maritime shipping, the members of the crew attended to all the services incident to the management and operation of the vessel. Thus, the seamen were often required to make major repairs to any part of the vessel, including the engines, decks, bulkheads and, on occasion, to the hull itself. Overhauling the vessel to prepare it for sea was, likewise, not infrequently the function of the members of the crew.

With the passage of time came the recognition that certain of the services performed by seamen could be done

more expeditiously by harbor workers specially trained in specific phases of the ship's business. Accordingly, this recognition of increased benefit to the shipowner caused certain of the crew's functions to fall to the lot of specialized harbor workers; however, it was nowhere contemplated that the shipowner at the time it was reaping those benefits from delegation of activity was also insulating itself from liability by such delegation.

The work performed by these shoreside workers, therefore, continued to be treated as maritime service because it had a direct bearing and bestowed direct benefit upon the vessel engaged in navigation. *State of Washington v. Dawson*, 264 U. S. 219. It was the nature of these services and their relationship to the vessel in navigable waters which caused harbor workers to be classed as seamen under the maritime law. In *Atlantic Transport Company v. Imbrovek*, 234 U. S. 52, this court stated in these terms (p. 61):

> "The libellant was injured on a ship, *lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character.* Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; *and it is a service absolutely necessary to enable the ship to discharge its maritime duty.* Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class '*as clearly identified with maritime affairs as are the mariners.*'" (Emphasis added.)

The same rule may be traced to the earliest days of our jurisprudence. In *Gerrity v. Bark Kate Cann*, 2 F. 241, a stevedore was injured as a result of a defective brace on the vessel. It was there contended that the longshoreman

possessed the same rights enjoyed by the members of the crew. Judge Benedict, in agreeing with this contention, stated (p. 246):

> "In regard to the presence of the libellant in the between-decks, the evidence shows that *he was not there by mere sufferance or license of the shipowner, but for the purpose of performing a service that could not be performed elsewhere, and in which the shipowner had an interest.* To be sure, the libellant was not directly employed by the shipowner, and it may be truly said that no relation by contract existed between the shipowner and the libellant. But the libellant was trimming the shipowner's ship. He was doing what was necessary to be done to enable the ship to carry the cargo in safety, and the reason why he was so employed was because the shipowner had, by a contract with the charterer, indirectly provided for the performance of this service.
>
> "*There was a relation between the shipowner and the libellant arising, not out of the mere presence of the libellant on board the ship, but out of the service he was then engaged in performing, the necessity of that service to the shipowner, and the circumstances of the libellant's employment to perform that service.*" (Emphasis added.)

Judge Benedict in the same case made it clear that it was the service on behalf of the vessel which determined the status of the worker (p. 247):

> "For these reasons I conclude that the damages sued for arose from the neglect of a duty owing by the shipowner to the libellant. This neglect was the neglect of a maritime duty, and attaches to the ship herself. Not only did the neglect occur upon navigable water, *but in the performance of a service necessary to be performed to enable the ship to receive her cargo.*" (Emphasis added.)

Judge Benedict thus stated the criteria which have since become the true basis for the application of the warranty.

In *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, where a longshoreman was injured when a latent defect in a shackle caused the boom to fall upon him, it was contended that because the longshoreman was engaged in loading and unloading the vessel, he could not be regarded as a seaman; this court rejected that contention and held that a longshoreman must be regarded as a seaman because of the maritime service which he performs on the vessel. After a full review of the authorities, this court stated (p. 99):

> "Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under statutory liability within the admiralty field. *It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards.*" (Emphasis added.)

Note that here again this court adopted the same criteria as Judge Benedict in *Gerrity* in applying the warranty: (1) that the injury be incurred while the vessel is in navigable waters; and (2) that the man be engaged in seaman's work.

That this concept was not to be limited to those engaged in loading and unloading of the vessel was made clear in *Pope and Talbot v. Hawn*, 346 U. S. 406. There the shipowner entered into a contract with an independent contractor for the repair of the loading equipment on the vessel. Libellant was an employee of the contractor and

was injured while engaged in the aforesaid repairs. In that case, the shipowner attempted to have the court overrule its opinion in *Sieracki*, or, in the alternative, to limit the application of *Sieracki* to the loading and unloading of vessels. This court rejected both contentions, and in so doing stated (p. 412):

> "We are asked to reverse this judgment by overruling our holding in Seas Shipping Co. v. Sieracki (US) supra. Sieracki, an employee of an independent stevedoring company, was injured on a ship while working as a stevedore loading the cargo. We held that he could recover from the shipowner because of unseaworthiness of the ship or its appliances. We decided this over strong protest that such a holding would be an unwarranted extension of the doctrine of seaworthiness to workers other than seamen. *That identical argument is repeated here. We reject it again and adhere to Sieracki.* We are asked, however, to distinguish this case from our holding there. It is pointed out that Sieracki was a 'stevedore'. Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny Hawn the protection we held the law gave Sieracki. These slight differences in fact cannot fairly justify the distinction urged as between the two cases. *Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness.*" (Emphasis added.)

See also *Torres v. Kastor*, 227 F. 2d 664; *Crawford and Lucibello v. Pope & Talbot, Inc.*, 266 F. 2d 784; *Pinion v. Mission Shipping Co.*, 156 F. Supp. 654; *Pioneer v. Hall*, 227 F. 2d 262; *Imperial Oil Ltd. v. Drlik*, 234 F. 2d 4; *Lester v. U. S.*, 234 F. 2d 625; *Ronosich v. United Drydock & Repair Co.*, 67 F. 2d 377; *Read v. U. S.*, 204 F. 2d 708.

If it be conceded, as it must, that the injury occurred upon navigable waters and while petitioner was engaged in an effort designed to prepare the vessel for sea—a service which is necessary to enable the ship to discharge its maritime function—it cannot be contested but that petitioner was entitled to the benefits of the warranty of seaworthiness.

The attempted distinction between a vessel in active navigation and a vessel which is merely in navigation finds no support in the fabric of the admiralty law. In *U. S. v. Lindgren*, 28 F. 2d 725, aff'd 281 U. S. 38, the vessel, as the vessel at bar, had been laid up and repairs were being made to ready her for sea. The worker was killed while engaged in the work of preparing the vessel for sea. The late Chief Judge Parker, speaking for the court, made the following analysis (p. 728):

> "The Hybert had been laid up, it is true, but some time prior to the death of decedent she had been taken to the dry dock and was undergoing repairs preparatory to a voyage. Decedent was employed as third officer and came on duty for the first time on the morning of his death. *At the time he received the fatal injury he was engaged in preparing the vessel for sea.*
>
> "A seaman was defined by Congress in the Act of June 7, 1872, as any person employed or engaged to serve on board a vessel. R. S. Sec. 4612 (46 USCA Sec. 713). And in construing the Merchant Marine Act here under consideration the Supreme Court has held stevedores to be seamen within the meaning of the act because engaged in maritime service formerly rendered by the ship's crew. International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157. In that case the court said: 'We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a

stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of business. If they should be protected in the one case they should be in the other.'

"Certainly seamen employed to take a ship to sea *who are engaged in making her ready for the voyage are not to be denied the status of seamen and the benefit of the act merely because the vessel is not commissioned at the time.*' See The Progresso (D. C.) 46 F. 292; The William Leishear (D. C. 21 F. (2d) 862." (Emphasis added.)

See also *The Steamship Jefferson*, 215 U. S. 130 (1909); *Read v. U. S., supra; Crawford and Lucibello v. Pope and Talbot, supra; Rogosich v. Union Drydock and Repair Co., supra.*

Nor can respondent here seek any comfort from the case of *Despar v. Staived Rich Ferry Co.*, 342 U. S. 187. *In limine*, it must be noted that the issue in the *Despar* case was whether a claim for the death of a workman making repairs upon a motorboat which had been hauled completely out of the water was to be asserted under the workmen's compensation laws or under the Jones Act, and it was not whether the workman injured while on a vessel in navigable waters was entitled to the benefits flowing from the warranty of seaworthiness.

The court in holding that the employee in *Despar* was not a member of the crew of any vessel emphasized the fact that there was no vessel in navigation at that time in that the motorboats were completely out of the water having been stored on land. The court stated in this regard (p. 190): "The boats were not afloat and had neither captain nor crew."

To sum up the *Despar* case, therefore, the court held that the employee was not a seaman under the Jones Act because the vessel was not in navigable waters at the time

of the accident; it had no crew; and he was not attached to any vessel. These factors are prerequisites to the application of the Jones Act. Had the vessels involved in the *Desper* case been in navigable waters and the decedent injured while preparing the vessel for sea, the result would have been directly opposite to that reached. See *U. S. v. Lindgren, supra.*

Finally, it must be pointed out that the extent of the repairs in the case at bar is not such as to deprive petitioner of the warranty of seaworthiness. The court below found as a fact that the specifications of the repair contract required the contractor to overhaul the vessel, and this included the cleaning and repairing of water lines, the replacement of defective or missing plugs and the testing of all lines before closing and placing them in active operating condition. This kind of work and repair has never been beyond the scope of seamen's work, both at sea and in port.

The principle involved precludes any distinction between a "little" repair as against substantial repairs. However, some courts have made a distinction between substantial *structural* repairs which change the very fabric of the vessel, as against other repairs; but at this point there is a conflict in the cases. Although the facts at bar do not reach that issue, it may be helpful to briefly refer to those decisions.

In *Berge v. National Bulk Carriers*, 251 F. 2d 717, where a tanker was converted into a ship of general carriage, and the conversion required the removing of her deck, the burning out of her partitions and bulkheads, making new bulkheads and partitions and renewing the longitudinal and deck beams, Judge Murphy there stated, 148 F. Supp. 611, that this work amounted "to virtual rebuilding of the interior of the vessel."

Nor were the repairs in the instant case similar to those in the case of *Baida v. U. S.*, 153 F. Supp. 777, aff'd per cur., 252 F. 2d 117, where the court stated (p. 778):

"On July 9, 1954 the United States entered into a master contract, . . . for repair and alteration of vessels with the Bethlehem Steel Company . . . to perform *major structural repairs* on the dredge Goethels including conversion of the sump re-handling system from a bottom dump method of unloading to a pump unloading system at an approximated cost in excess of $600,000." (Emphasis added.)

On the other hand, the court below in *Read v. U. S.*, 201 F. 2d 758 (3 Cir., 1953), refused to make any distinction between structural and other repairs, and held that harbor workers engaged in all such repairs are entitled to the benefits of the warranty.

The attempt of the Court of Appeals below to distinguish its previous holding in *Read*, fails to withstand analysis. In the *Read* case, the Government transformed a Liberty type ship to a troop transport. This, of course, entailed considerable structural alteration. Yet, when a harbor worker was injured while engaged in work in one of the four deep tanks in the lower hold because of an alleged failure to provide adequate safeguards around the deep tank, the Court of Appeals held that the repairman was entitled to recover on the basis of the unseaworthiness of the vessel (p. 761):

"The Sieracki case also specifically stated that the vessel's obligation of seaworthiness extends to stevedores while working aboard the ship. In Hawn v. Pope & Talbot, Inc., 3 Cir., 1952, 198 F. 2d 800, we held that *the vessel's liability for unseaworthiness extended to a carpenter employed by one having a contract to repair the ship* as in the instant case.

"On the score of unseaworthiness we have already found that there were two or three defective lighting appliances on the main deck which the libellant and other workmen tried to use but could not. From that

testimony it is reasonable to infer that these appliances were defective at the time the ship was turned over to the subcontractor since there is no evidence that those lights had been used by anyone during the day. *Clearly then, there was here a 'failure to supply and keep in order the proper appliances appurtenant to the ship.'* The Osceola, supra.

"*We conclude, therefore, that there was a breach of the shipowner's warranty of seaworthiness.*" (Emphasis added.)

Here, the cleaning, inspecting and repairing of water lines, and the replacement of defective plugs were not such as to fall under the categories of structural changes or reconstruction of the vessel. Thus, while it is agreed that the *Read* case is distinguishable from that at bar, its basis of distinction is a favorable one to the petitioner, and does not support the conclusions reached by the Court of Appeals.

Finally, the court's reliance on *Berryhill v. Pacific Far East Lines*, 238 F. 2d 385, is misplaced. In that case the vessel was put in drydock for major repairs. The court held that the doctrine of seaworthiness did not apply, giving as the basis for its decision (p. 387):

"The Courts have recognized the distinction between the protection required by a seaman, and one who works on a ship cradled on dry land. The very reason for the rule of absolute liability ends, when the vessel is not on water."

The above decision was patently erroneous because the drydock is regarded as part of the water and within the admiralty jurisdiction and there was, therefore, no basis for such a distinction. *U. S. v. Lindgren, supra; Rogosich v. United Drydock, etc., supra.* Nevertheless, the fact that the injuries at bar occurred while the vessel was in navi-

gable waters distinguishes it in any event from the *Berryhill* case.

Further, the work involved in inspecting, cleaning and repairing of the pipes was not such as to place West within the exclusionary orbit of specialization essayed by this court in *United N. Y. and N. J. Sandy Hook Pilots Association v. Halecki*, 3 L. Ed. 2d 49.

In this case, the court below found that a plug had been loosely fitted in one of the water lines above which, when the water pressure was turned on, blew out and injured libellant. That this was an unsafe and unseaworthy condition is hardly open to dispute. That petitioner was a beneficiary of the warranty of seaworthiness is clear, for his injury occurred on navigable waters, while he was engaged in the service of the vessel. If one of the officers who constituted the crew of the "Mary Austin" had been struck by this very plug instead of petitioner, there could be no question but that he would have recovered under the warranty of seaworthiness, and it must follow that petitioner has an equal right to recover under those circumstances. The court below, therefore, clearly was in error in holding that the warranty of seaworthiness did not apply in this situation.

**Point Four: Respondent Is Liable Under Theories of Unseaworthiness for Failing to Provide Petitioner With a Safe Place to Work.**

The learned court below correctly stated that respondent was under a duty to provide petitioner with a safe place to work, and that this duty was a non-delegable one; however, the court stated further that this duty was not an absolute one but was related to negligence and was tempered by the requirement of reasonable care in place of the absolute duty under the warranty.

This qualification of the shipowner's duty does violence to the established rule of maritime law that the duty to pro-

vide a safe place to work is both absolute and non-delegable. The pertinent maritime principle was considered by the Court of Appeals for the Sixth Circuit in *The Scandbec*, 102 F. 2d 577, where the court stated (p. 581):

> "It is the duty of a shipowner or master to supply a seaworthy vessel for its employees and *this does not depend on the exercise of reasonable care, but is absolute*. The H. A. Scandrett, 2 Cir., 87 F. 2d 708. A seaman does not assume the risk of injury even from obvious dangers if the proximate cause thereof is the failure of the shipowner or master to supply and keep in order proper appliances appurtenant to the ship and *the same rule applies for failure to provide a safe place in which to work*. Cleveland Cliffs Iron Company v. Martini, 6 Cir., 96 F. 2d 632; Socony-Vacuum Oil Company v. Smith, 305 U. S. 424, 59 S. Ct. 262."

This court in *Mahnich v. Southern Steamship Co.*, 321 U. S. 96, stated in this connection (p. 102):

> "In thus refusing to limit, by application of the fellow servant rule, the liability of the vessel and owner for unseaworthiness, this Court was but applying the familiar and then well established rule of non-maritime torts, that the employer's duty to furnish the employee with safe appliances and a safe place to work, is non-delegable and not qualified by the fellow servant rule."

See also *Pacific Far East Lines v. Williams*, 234 F. 2d 378, and *Poignant v. U. S.*, 225 F. 2d 595, where the late Judge Frank, in a concurring opinion stated (p. 603):

> "The Third Circuit has since interpreted its Cookingham 'transitory' doctrine to mean that the ship's liability for a 'transitory' object depends upon the length of time during which the object was not removed. See Crawford v. Pope & Talbot, Inc., 3 Cir., 206 F. 2d

784, 789, 790. I understand that my colleagues repudiate that thesis. The Third Circuit, in a still later case, explaining the Cookingham doctrine, has said that it turns on a distinction between (a) the duty to provide a seaworthy ship, which is absolute, and (b) the duty to provide a safe place to work, which, so that court holds, demands reasonable care only. See Brobazon v. Belships Co., 3 Cir., 202 F. 2d 904, 906. *I think that distinction directly at odds with the Supreme Court's decisions. I read my colleagues' opinion as repudiating it also.*" (Emphasis supplied.)

Since the court below found that the plug in the pipe had been loosely fitted and catapulted out when the water pressure was negligently turned on, it follows that respondent failed to provide petitioner with a safe place to work. In *Cranmer v. Joachim Hendrik Fisser*, 3 L. Ed. 2d 413, where the safety cut off device on the winch was set at twice the tunnage limit of the winch rigging, and the negligence of the stevedore in the placing of the booms brought the unseaworthy condition of the vessel into play, it was stated by this court, at page 417:

"The shipowner is not relieved of these responsibilities by turning control of the loading or unloading of the ship over to a stevedore company. It was held in Grillea v. United States (CA 2 NY) 232 F. 2d 919, that stevedores themselves could render a ship pro tanto unseaworthy and make the vessel owner liable for injuries to one of them. And see Rogers v. United States Lines, 347 U. S. 984, 98 L. ed. 1120, 74 S. Ct. 849; Alaska S. S. Co. v. Petterson, 347 U. S. 396, 98 L. ed. 798, 74 S. Ct. 601. We need not go so far to sustain the District Court here. For there is ample evidence to support the finding that these stevedores did no more than bring into play the unseaworthy condition of the vessel. The winch — an appurtenance of the vessel — was not inherently defective as was the rope in

> the Mahnich Case. But it was adjusted by those acting for the vessel owner in a way that made it unsafe and dangerous for the work at hand.
>
> That was the theory of the District Court; it correctly applied the concept of unseaworthiness. . . ."

It is now clear since this court's decision in *Cranady* that the unsafe condition brought into play by the negligence of the independent contractor makes the shipowner liable under the warranty.

**Point Five: The Shipowner Is Liable Under Theories of Negligence in Failing to Provide a Safe Place to Work and to Warn of the Dangerous Condition.**

Putting to one side the absolute duty of the shipowner to supply petitioner with a safe place to work, and analyzing the facts at bar in terms of due care and non-delegability, still the respondent is liable for the injury suffered by the petitioner.

The learned court below held that the "Mary Austin" was delivered to the independent contractor with its water tanks and pipes completely drained. The court further opined that nothing in the condition of the vessel as it then stood could have caused the petitioner's injuries, but that only the exertion of the external force produced the injuries sued upon. That external force, of course, was the placing of water in the pipes along with the normal amount of pressure resultant therefrom. This force was supplied by the contractor. Accordingly, the court held that the accident was caused by the positive, *negligent* act of a fellow employee of petitioner, and that the shipowner was not liable for such conduct.

There is no question but that the loose plug created an unsafe condition, albeit a latent one, for it is obvious that it was not fit for the purpose for which it was intended.

The duty to supply a business invitee with a safe place to work is a non-delegable one. *Vanderlinden v. Lorentzen*,

139 F. 2d 995 (2 Cir., 1944); *Amato v. U. S.*, 167 F. Supp. 929; *Palazzolo v. Pan Atlantic S. S. Co.*, 211 F. 2d 277. The court below found that the contractor was negligent in turning on the water. Thus, the negligent act of the contractor in turn acted upon the preexisting latent dangerous condition, thereby creating a patent one resulting in the injury. It might be noted that this is not a case where the injury-causing negligence was merely an incident in a continuous operation. Of course, the accident would not have occurred were it not for the negligence of the contractor in turning on the water; likewise, it would not have occurred were the plug properly fitted. In this regard, this factual situation is comparable to that in *Cranaday v. Joachim Hendrik Fisser, supra*. In that case a preexisting dangerous condition was brought into play by the negligent act of the longshoremen, and the court held that under the shipowner's absolute non-delegable duty to supply a safe place to work, the shipowner was liable not only for its passive unseaworthiness but for the active negligence of the stevedoring contractor.

Assuming for this purpose that recovery under the theory of unsafe place to work differs from that of unseaworthiness, in that in the former you must prove a lack of due care and in the latter there is absolute liability, this requisite was supplied by the contractor's negligence. Certainly, under the theory of non-delegability, the shipowner cannot escape liability because the negligent action of another brought into play a preexisting dangerous condition. If the non-delegable aspect of the duty to supply a safe place to work has any meaning whatsoever, it cannot permit a shipowner to delegate a job to a contractor under circumstances such as exist at bar, and thereby insulate itself from liability because the contractor supplies the positive element to a preexisting dangerous condition. If an unsafe condition is created, the shipowner must stand responsible, regardless of how it is created. However, in the case at bar, we need not go so far. It would not be unreasonable

to say that the government anticipated that the water pressure would necessarily have to be turned on. It knew or had reason to know that the plugs were loose. Knowing that the vessel had been in mothballs for an extensive period of time and recognizing that the ship had been built for use in World War II, the shipowner was charged with the knowledge of the extreme hazard which would be created as a result of the water pressure and the loose plug. Under such circumstances, the shipowner breached its obligation to West. As was stated in *Halecki v. United N. Y. and N. J. Sandy Hook Pilots Assn.*, 251 F. 2d 708, aff'd in part 3 L. Ed. 2d 49 (1959), where a harbor worker was killed as a consequence of inhalation of carbon tetrachloride fumes, with which chemical he was spraying the generators of the ship being overhauled in a New Jersey Shipyard, the court of appeals found that the shipowner was charged with the knowledge that carbon tetrachloride was to be used in a confined space, and stated at F. 2d p. 711:

> "The deceased was certainly an 'invited person,' or 'business guest,' and the shipowner was liable, not only for the negligence of the master, but, although the work was let out to a subcontractor, also for any lack of 'reasonable care' to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities."

See also *Aldridge v. States Marine Corp. of Delaware*, 265 F. 2d 708 (9 Cir., 1959), where a longshoreman was killed because of the dangerous manner in which the longshoremen were "breaking out" drafts of cargo, and that court found that the dangers involved should have been known to the ship's officers. And see Restatement of Torts, Vol. 2, Sec. 344, Comment b.

The shipowner's duty, as based upon theories of negligence alone, apart from any liability under the warranty, is non-delegable in the use of due care under the circumstances, and this shipowner becomes responsible for any lack of due care; whether that lack be directly attributable to him or to anyone for whose conduct he is responsible under his non-delegable duty. Accordingly, the finding of the court below that the shipowner exercised reasonable care and supplied petitioner with a safe place to work is clearly erroneous.

## CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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